

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ODELL GENE GOLDEN,)	
)	
Petitioner,)	
)	1:13CV163
v.)	1:12CR26-1
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner, a federal prisoner, has submitted a Motion to Vacate, Set Aside, or Correct Sentence (Docket Entry 35) pursuant to 28 U.S.C. § 2255. This Motion cannot be further processed for the following reason:

1. Petitioner has a direct appeal pending in the United States Court of Appeals for the Fourth Circuit. While there may be no jurisdictional problem with a motion under § 2255 proceeding at the same time as a direct appeal, the Advisory Committee Note to Rule 5 of the Rules Governing Section 2255 Proceedings states that it is “inappropriate” to simultaneously maintain a direct appeal and a motion under § 2255. Where a prisoner files such a motion while a direct appeal is pending, the normal practice is to dismiss the § 2255 motion without prejudice to it being refiled once the direct appeal process has ended. See, e.g., Capaldi v. Pontesso, 135 F.3d 1122 (6th Cir. 1998); United States v. Deeb, 944 F.2d 545 (9th Cir. 1991).

Because of this pleading failure, this particular Motion will be dismissed, but without prejudice to Petitioner promptly filing a new motion properly following the 28 U.S.C. § 2255 forms once his direct appeal concludes. The Court has no authority to toll the statute of limitation, therefore Petitioner must act quickly if he wishes to pursue this Motion after his

appeal. See Spencer v. Sutton, 239 F.3d 626 (4th Cir. 2001). To further aid Petitioner, the Clerk is instructed to send Petitioner new § 2255 forms and instructions for filing a § 2255 motion, which Petitioner should follow if he wishes to refile after his direct appeal has finished.

IT IS THEREFORE ORDERED that the Clerk is instructed to send Petitioner § 2255 forms and instructions.

IT IS THEREFORE RECOMMENDED that this action be filed and dismissed *sua sponte* without prejudice to Petitioner promptly filing a corrected motion on the proper § 2255 forms once his direct appeal concludes.

This, the 5th day of March, 2013.

/s/ L. Patrick Auld
L. Patrick Auld
United States Magistrate Judge